IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6626 of 1987

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UMEDBHAI M PATEL

Versus

STATE OF GUJARAT

Appearance:

MR JR NANAVATI for Petitioner

MR RJ OZA for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

Date of decision: 24/03/2000

CAV JUDGEMENT (Per DM Dharmadhikari, CJ)

1. The petitioner who was employed as an Executive Engineer in the services of the State of Gujarat, is challenging by this petition the order dated 13-2-1987 (Annexure-B) retiring him compulsorily in public interest under Rule 161 (1) (aa) (i) of the Bombay Civil Services Rules, 1959; by which, admittedly the service conditions of the petitioner were regulated.

2. At the time when the petitioner was compulsorily retired from services, he was under suspension by order dated 22-5-1986 (Annexure-A). In the order of suspension it has been mentioned that, the petitioner was suspended for a contemplated inquiry as he has committed misconduct of misuse of powers in connection with purchase of tarpaulin and causing consequent financial loss to the Government. Learned Sr. Counsel Shri. J.R. Nanavati appearing for the petitioner assails the order of compulsory retirement, and contends that, from the reply affidavit submitted by the State Government it is clear that the order of compulsory retirement has been passed by way of punishment. It is not passed to serve any public interest or on the basis of poor record of performance of the petitioner. The compulsory retirement order is not based on any adverse confidential reports of the petitioner. It is contended that, the action of compulsory retirement in the background of the fact that the petitioner was under suspension on specific charges of misconduct and dereliction of duty is mala fide, and has been passed with an oblique purpose to bye-pass holding of a regular departmental inquiry against the petitioner. It is submitted that, the respondent State having failed to justify the order of compulsory retirement on the basis of any poor record of performance of the petitioner, the same deserves to be quashed.

3. On behalf of the State, learned Asst. Govt. Pleader appearing for the State made some attempt to support the order of compulsory retirement on the ground that, as per the Government circulars, the petitioner could be retired compulsorily as his integrity was doubtful. It is submitted that the petitioner was on the verge of retirement and permitting such a person to continue in service would have been against the public interest. The order of compulsory retirement therefore was passed on bona fide grounds and in accordance with law.

4. In order to decide whether the order of compulsory retirement has been passed bona fide in interest of public, or it is a mala fide exercise of power as alleged on behalf of the petitioner, it is necessary to examine the stand taken on behalf of the State in its reply on affidavit. In para-4 and 7 of the reply, State Government has alleged that the petitioner in the course of his service had committed serious irregularities in the matter of purchase of stores material and has caused financial loss to the Government. Huge loss worth Rs.69.36 lacs have been shown to have

been caused because of the petitioner's misconduct in making purchase against the prescribed rules. It is also alleged that the petitioner made over payments to the suppliers. Several allegations based on misconduct (8 in number) have been mentioned in para-7 of the reply. It is on the basis of the above allegations and charges, in reply affidavit it is stated that "from the aforesaid facts, I say that, it could be gathered that his integrity was doubtful". In para-13 of the reply, compulsory retirement is sought to be supported only on the ground that the petitioner's 'integrity was doubtful'. It is reiterated that, his retirement prematurely was not based on his past performance.The exact words from the reply on affidavit are, " however I say that the petitioner is not retired prematurely on the basis of his performance".

5. In the return, a reference has been made to a GAD Circular dated 25-10-1963, which is not produced before the Court. The contents of the circular to be found in the reply are that, if the authorities concerned have reasonable cause to believe that a Government servant is lacking in integrity, it would be appropriate to consider him for premature retirement, irrespective of an assessment of his ability or efficiency in work. In para-13 of the reply this has been stated very categorically as under:-

> "... I say that the petitioner was retired prematurely in view of the grounds mentioned in para 7 hereinabove. "

6. It has already been stated that, para-7 contains 8 specific allegations of charges which were under inquiry against the petitioner and which are the basis for coming to an opinion by the concerned authority that the petitioner is lacking in integrity.

7. The other important part of the reply, which to a great extent supports the contention advanced on behalf of the petitioner is that, the authorities were of the view that, allowing the petitioner to continue under suspension on payment of subsistence allowance would be a burden on the public exchequer. It was therefore found appropriate to prematurely retire him as it was not possible to conclude the inquiry before he reached the age of superannuation. The relevant para contained in para-15 of the reply needs to be quoted.

> " 15. With reference to the contents of Ground (7) of the petition, it is stated that during

suspension, a Government employee does not cease to be Government employee, but he is kept away from active duty, so that he cannot tamper with the record and influence the office. The petitioner is paid subsistence allowance during the period of suspension. It would, therefore, be a burden on the public exchequer in payment of subsistence allowance to an employee whose integrity is in doubt without any commensurate benefit and the public interest would be jeopardized, if the petitioner is continued under suspension till he attains the age of superannuation, by which the inquiry against him might not have been concluded. It is, therefore, denied that the impugned order is not passed in the public interest, but has been passed for extraneous considerations and ulterior motive. It is also denied that the said order is illegal, malafide and violative of Articles 14 and 16 of the Constitution of India ".

8. Rules 161 (1) (c) (ii) (I), have been framed for particular services for retirement at the age of superannuation and premature retirement in public interest. Government servants in the Bombay Services of Engineers, Class I, can be retired on attaining superannuation age of 58 years and can be compulsorily retired on reaching the age of 50 years. The petitioner had long before his compulsory retirement, in the year 1980 had crossed the age of 50 years and on the basis of his past performance was permitted to continue in service. This fact has not been denied on behalf of the Government in reply on affidavit. It is stated in para-17 as under:-

"17.... It is stated that the case of the petitioner was reviewed at his age of 50 years in 1980, but then there was no adverse cause against him and Govt. therefore, decided to continue him in Government service beyond that age. However, at the time of review of his case, at the age of 55 years, he was facing inquiries mentioned in para 7 hereinabove and his integrity was in doubt. It is stated that so far as premature retirement is concerned, Clause (aa) (i) (1) of the BCSRs is made applicable in his case and, therefore, it is denied that the impugned order is without jurisdiction and is in violation of Articles 14 and 16 of the Constitution of India."

From the above detailed resume of the stand taken on behalf of the State Government in its reply, it is clear that, the petitioner's retirement prematurely is solely based on the fact that; there were serious allegations of irregularities in purchases and payments made against the petitioner and that was the only basis on which his integrity was found to be doubtful.

9. In RAM EKBAL SHARMA VS. STATE OF BIHAR AND ANR. (1990) 3 SCC, 504, it has been held that :-

> " Even though the order of compulsory retirement is couched in innocuous language without making any imputations against the government servant who is directed to be compulsorily retired from service, if challenged, the court, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the government servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the court from delving into the basis of the order if the order in question is challenged by the concerned government servant. ".

10. In STATE OF UTTAR PRADESH V. MADAN MOHAN NAGAR, A.I.R. 1967, SC 1260, the Constitution Bench of the Supreme Court held :-

> "... The test to be applied in such matters is " does the order of compulsory retirement cast an aspersion or attach a stigma to the officer when it purports to retire him compulsorily ? " It was observed that if the charge or imputation against the officer is made the condition of the exercise of the power it must be held to be by way of punishment - otherwise not. In other words if it is found that the authority has adopted an easier course of retiring the employee under rule 56(j) instead of proceeding with or concluding the enquiry or where it is found that the main reason for compulsorily retiring the employee is the pendency of the disciplinary proceeding or the levelling of the charges, as the case may be, it would be a case for holding it to be penal. "

11. Attention of the Court was also invited to a decision in STATE OF U.P. AND ANOTHER VS. ABHAI KISHORE MASTA, (1995) 1 SCC 336, in which the decision of

Constitution Bench in Madan Mohan Nagar was distinguished. In the case of Abhay Kishore Masta, it was observed :-

" But there may also be a case where the order of compulsory retirement is not really or mainly based upon the charges or the pendency of disciplinary enquiry. As a matter of fact, in many cases, it may happen that the authority competent to retire compulsorily under Rule 56 (j) and authority competent to impose the punishment in the disciplinary enquiry are different. It may also be that the charges communicated or the pendency of the disciplinary enquiry is only one of the several circumstances taken into consideration. In such cases it cannot be said that merely because the order of compulsory retirement is made after the charges are communicated or during the pendency of disciplinary enquiry, it is penal in nature. "

12. This Court has already extracted in detail the contents of reply on affidavit given by the State Government to justify its action. It is clear from the stand taken that the order of compulsory retirement in case of the present petitioner is based solely on the allegations of misconduct mentioned in the order of suspension, and elaborately mentioned in the reply to the petition. The order of retirement is based on the specific allegations or charges for which the petitioner was under suspension. It is on those allegations and charges the appropriate authority formed an opinion that the petitioner lacked in integrity. The order of compulsory retirement is not being supported on any adverse confidential reports or performance of the petitioner during his service tenure. It is thus clear that the grounds of the order of compulsory retirement are the charges based on misconduct for which the petitioner was under suspension and was awaiting a formal inquiry. The appropriate authority instead of completing the inquiry adopted a short cut and dispensed with his services on the alleged ground of public interest, and on forming an opinion that the petitioner's integrity was doubtful. What is to be noted is that the petitioner was suspended on 22-5-1986. Thereafter, he was not served with any charge sheet within a reasonable time. He was compulsorily retired on 13-2-1987 at the age of little over 56 years. His date of birth is stated to be 17-8-1930. He was due for retirement at the age of 58 years on 17-8-1988. It is difficult for the Court to understand as to why between the date of suspension, i.e.

22-5-1986 and his due date of retirement on superannuation dated 17-8-1988, completion of inquiry was not possible. In the reply of the State, it has been stated that, the decision to dispense with the service of the petitioner on compulsory retirement was taken, as continuing him under suspension and paying of subsistence allowance to the petitioner would have been a burden on the public exchequer. The above can hardly be a ground to bye-pass a departmental inquiry. Only on the basis of allegations in the order of suspension, the petitioner could not be held to be a servant of doubtful integrity. There were specific allegations against the petitioner of irregularities in purchase and payments to the suppliers. He was prepared to face the inquiry and would have been able to prove his innocence. That opportunity was denied to the petitioner. The impugned order of compulsory retirement, according to his Court, is clearly punitive and has been passed by way of punishment without following the constitutional provisions contained in Article 311 of the Constitution of India. The power of compulsory retirement cannot be used for an oblique purpose to punish a government servant for specific misconduct. Bye-passing procedure for holding an inquiry, is denial of constitutional right of the government servant under Article 311 of the Constitution of India. I am supported in my conclusion by the decisions of the Supreme Court (supra) as also the latest decision of the Supreme Court in the case of STATE OF GUJARAT AND ANOTHER VS. SURYAKANT CHUNILAL SHAH (1999) 1 SCC, 529. In some what similar circumstances, mere involvement in criminal cases, recourse to the power of compulsory retirement was taken against the government employee. The Supreme Court after examining the record of the past service of the employee, and the background of pending criminal case in which action was taken, observed and held as under:-

" The whole exercise described above would, therefore, indicate that although there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a government servant or that he had lost his efficiency and had become a dead wood, he was compulsorily retired merely because of his involvement in two criminal cases pertaining to the grant of permits in favour of fake and bogus institutions. The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately

conducted. But before that stage is reached, it would be highly improper to deprive a person of his livelihood merely on the basis of his involvement. We may, however, hasten to add that mere involvement in a criminal case would constitute relevant material for compulsory retirement or not would depend upon the circumstances of each case and the nature of offence allegedly committed by the employee.

There being no material before the Review Committee, inasmuch as there were no adverse remarks in the character roll entries, the integrity was not doubted at any time, the character roll entries subsequent to the respondent's promotion to the post of Assistant Food Controller (Class II) were not available, it could not come to the conclusion that the respondent was a man of doubtful integrity nor could have anyone else come to the conclusion that the respondent was a fit person to be retired compulsorily from service.The order, in the circumstances of the case, was punitive having been passed for the collateral purpose of his immediate removal, rather than in public interest. The Division Bench, in our opinion, was justified in setting aside the order passed by the Single Judge and directing reinstatement of the respondent. "

13. On behalf of the State, reliance is placed on a decision in STATE OF MADHYA PRADESH AND OTHERS VS. INDRA SEN JAIN, A.I.R. 1998, SC. 982. I have looked into the facts of that case. In that case there were successive orders of suspension against the government servant which did not result in any imposition of punishment on the servant. The order of compulsory retirement was however upheld by the Supreme Court on the basis of the service record of the servant which was produced before the Court. That is not the case here. The State has neither produced service record of the petitioner nor it is their case that the compulsory retirement is based on consideration of adverse remarks in the service record. The State has supported the order of compulsory retirement only on the allegations contained in the order of suspension and alleging on that basis that the petitioner was lacking in integrity.

14. The petitioner therefore has been able to demonstrate that the order of compulsory retirement was

passed with an oblique purpose to punish him for the charges, which were neither investigated nor against which he had been given any reasonable opportunity to show cause. The formation of an opinion that he lacked in integrity is without any firm basis. The impugned order of compulsory retirement, therefore, deserves to be quashed on the ground that, it is punitive and is violative of Article 311 and Articles 14 & 16 of the Constitution of India. Consequently the petition succeeds and is allowed. The impugned order dated 13-2-1987 compulsorily retiring the petitioner from service is hereby quashed. The respondents are directed to treat the petitioner to be in service till he attained the age of 58 years and to pay him all arrears of salary and all other monetary benefits for the said period. Let the necessary computation of his dues be made within a reasonable period of three months and be paid to him, failing which the petitioner would be entitled to get interest at the Bank rate of 12% per annum from the respondents. Rule made absolute accordingly. However, in the facts & circumstances of the case, no order as to costs.

Dt: 24-03-2000 (D.M.Dharmadhikari, C.J.)

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